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For participants only

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Held at the Palais des Nations, Geneva, on Wednesday, 18 July 2018, at 10 a.m.

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Present:

Chairman:	Mr. Valencia-Ospina
Members:	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Succession of States in respect of State responsibility (agenda item 10) (*continued*) (A/CN.4/719)

The Chair invited the Commission to resume its consideration of the second report on succession of States in respect of State responsibility (A/CN.4/719).

Mr. Murase, after thanking the Special Rapporteur for his excellent second report, said that he first of all wished to make some general comments.

He had initially expressed scepticism about the Commission taking up the topic because he feared that it might simply end up copying and pasting the resolution on succession of States in matters of international responsibility adopted by the Institute of International Law in 2015 into its own work. He had to say that he remained sceptical.

He acknowledged that the second report took a different approach to that of the resolution of the Institute of International Law in addressing the transfer of rights and obligations arising from internationally wrongful acts. In the Institute of International Law resolution, articles 12 to 16, on the exceptions to the general rule of non-succession, addressed both the rights and the obligations arising from internationally wrongful acts of predecessor or successor States. The Special Rapporteur, on the other hand, limited the scope of the second report to issues related to the transfer of the "obligations arising from an internationally wrongful act of the predecessor State", while the third report, to be submitted in 2019, would in turn focus on "the transfer of the rights or claims of an injured predecessor State to the successor State". However, the Special Rapporteur did not explain, either in paragraph 21 of the report or elsewhere, why he had chosen that approach. It might have been to reflect the distinction made in the Commission's 2001 articles on responsibility of States for internationally wrongful acts between Part Two, which addressed obligations as legal consequences arising from the internationally wrongful act, and Part Three, which dealt with the rights related to the invocation of State responsibility.

It would be appreciated if the Special Rapporteur could clarify his reasons for, and the advantages of, taking an approach that differed from that of the Institute of International Law by separating rights and obligations. Admittedly, his approach might be supported if account were taken of the background against which Part One and Part Two of the 2001 articles had been artificially separated in order to differentiate between the rights of an injured State, in article 42, and those of a State other than an injured State, in article 48. However, like Mr. Park, he feared that such an approach might lead to some duplication, given that many of the exceptions to the general rule of non-succession were equally applicable to rights and to obligations as, for instance, where there was a direct link between the internationally wrongful act and the territory of the successor State. It might, after all, be better to follow the approach of the Institute in order to economize efforts and develop simpler draft articles.

Even if the Special Rapporteur's approach of separating rights and obligations was considered appropriate, the scope of obligations and rights in the proposed draft articles appeared to be too narrow. Draft article 6, which reflected the general rule of non-succession, confined its scope to invoking "the responsibility of the predecessor State" and claiming from it "a reparation for the damage caused by such internationally wrongful act". That limitation to "reparation" could be problematic, as it included only reparation and excluded cessation and non-repetition and legal consequences for serious breaches of *jus cogens*. The draft article also provided for the right of an injured State but excluded the right of a State other than an injured State and the issue of countermeasures, although the latter was to be addressed in the third report. In order to comprehensively address all possible cases, the current approach should be refined in line with the 2001 articles on responsibility of States for internationally wrongful acts and the 2015 resolution of the Institute of International Law.

Furthermore, it was curious that the Special Rapporteur had opted not to address a direct link between the act and the population as part of the exceptions to the general rule of non-succession. The report's territory-focused approach differed from that of the Institute of International Law resolution, which covered situations where there was a direct link

between the consequences of internationally wrongful acts and both the territory and the population in question. In the resolution, the link with the population appeared in each exception to the general rule of non-succession and was particularly pertinent in the case of "newly independent States". Article 16 (4) of the resolution clearly acknowledged "the rights arising from an internationally wrongful act ... against a people entitled to self-determination". The Special Rapporteur had perhaps omitted the population link because he believed it was relevant only to the succession to rights; however, there might be situations where succession to obligations also resulted from a direct link between the act and the population as, for example, where the population of the successor State had been unjustly enriched by the internationally wrongful conduct of the predecessor State.

Moreover, a unilateral undertaking by a successor State to succeed to obligations arising from a wrongful act was not itself sufficient for succession to occur. He believed that the other party to the responsibility relationship — the injured State or another victim subject — must also accept the undertaking. The final report of the Institute of International Law on State succession in matters of State responsibility stated that "the victim must have the possibility to express its view on the question of the holder of the obligation in its favour". It might therefore be pertinent to consider including in the draft articles the requirement that the consent of the injured subject to any agreement made among predecessor and successor States on the apportionment of obligations should be obtained. Consideration could also be given to a savings clause referring to the *pacta tertiis* rule that any agreement on succession to obligations must not affect the rights of an injured third party to invoke responsibility.

Turning to the specific draft articles proposed in the report, he said that he had seven points to make.

First, draft article 6 (1) could be made more specific. As it stood, the paragraph read: "Succession of States has no impact on the attribution of the internationally wrongful act committed before the date of succession of States." While he agreed with the substance of the paragraph, he felt that the following wording would be clearer and more straightforward: "State responsibility for an internationally wrongful act committed before the date of succession of States is attributable to the predecessor State."

Second, with regard to draft article 7 (3), it might be necessary to refer to how the predecessor and successor States should apportion rights and obligations after separation. Inspiration could be drawn from article 7 (2) of the Institute of International Law resolution, which read "in order to determine an equitable apportionment of the rights or obligations of the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of succession, the need to avoid unjust enrichment and any other circumstance relevant to the case". He agreed with the Special Rapporteur that unjust enrichment was one of the circumstances justifying the deviation from the general rule of non-succession, but was uncertain as to why it was not included in the draft articles. Furthermore, the successor State would necessarily take a position with regard to the wrongful act after the date of the State succession, a point on which the Commission should perhaps go further than the Institute of International Law had, by including the question of whether the successor State dissociated itself from the wrongful act as a factor to be taken into account in apportioning obligations after secession.

Third, with regard to draft articles 7 and 8, he wondered whether the Commission should also include a reference to the need for the predecessor and successor States to negotiate in good faith with a view to reaching agreement within a reasonable period of time. That was particularly pertinent in respect of draft article 8, where the newly independent State's agreement was central to the succession to obligations. The need to negotiate in good faith within a reasonable period of time was important in ensuring that the avenue of redress for injured third parties was not held in abeyance because of State succession.

Fourth, in draft article 7 (4), the effect of the current wording, "The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the

territory of a predecessor State or in a territory under its administration shall be considered an act of the new State under international law", could be made absolutely clear by adding a second sentence at the end of the paragraph to read: "Consequently, the predecessor State incurs no responsibility for the acts committed by the insurrectional or other movement." The same comment applied to draft article 8 (3), relating to national liberation or other movements.

Fifth, with regard to draft article 8, he agreed that there should be no succession to obligations unless the newly independent State agreed. It might be preferable, in the first sentence of paragraph 2 of draft article 8, to include the word "expressly" before "agrees". The second sentence of the paragraph could perhaps also be refined to clarify whether or not the "particular circumstances" constituted an exception to the newly independent States' ability to accept or reject responsibility. The current wording suggested that particular circumstances should be taken into consideration where there was a direct link between the act or its consequences and the territory of the successor State and where the former dependent territory had substantive autonomy. It was unclear to what extent successor States were required to take those circumstances into account in deciding whether or not to assume obligations. If they were required to do so, the circumstances would essentially constitute an exception to the non-succession rule in cases of newly independent States. The draft article could benefit from further clarification.

Sixth, he agreed that acts committed by an autonomous entity of the predecessor State should be accepted as one of the elements in support of succession to responsibility. He noted that one of the circumstances mentioned in draft article 8 (2) that should be taken into account was whether the former territory had substantive autonomy, but no reference was made to substantive autonomy in draft articles 7 or 9. Draft article 7 stated that responsibility passed along with seceded territory if the act was carried out by an organ of a territorial unit of the predecessor State that had later become an organ of the successor State. The Special Rapporteur probably presumed that those State organs had substantive autonomy, because in paragraph 97 of the report he acknowledged the need for a clear devolution of powers to local authorities in order for there to be succession to responsibility. It might be useful to refer expressly to substantive autonomy when mentioning State organs that became organs of the successor State, rather than simply presuming that they were autonomous at the time of the act. In fact, if substantive autonomy were to be presumed on the part of any territory, it should be presumed in cases of newly independent States, because a newly independent State was often a former colony or protectorate with substantive autonomy over domestic issues. The same presumption could not be made in cases of separation and transfer of territory, where it was more likely that the State organs and territorial units in question had had little or no autonomy at the time of the act. Accordingly, if it was necessary to refer to substantive autonomy in draft article 8, which dealt with newly independent States, then it was even more pertinent to refer to it in draft articles 7 and 9, which addressed separation and transfer of territory. There was clearly no need to refer to substantive autonomy when dealing with movements which had successfully established a new State, because it was fairly obvious that such movements were autonomous.

Seventh, with regard to draft article 11, instead of merely stipulating that the obligations passed to successor States in the event of dissolution, he wondered whether it might be specified that they must pass equitably, as was stated in article 7 (1) of the Institute of International Law resolution. It was true that, in respect of predecessor States which no longer existed, the presumption was one of succession rather than one of non-succession. But, as the Special Rapporteur had rightly pointed out in his oral introduction, the direct link between the act and the territory or population and the evolution of an organ of a predecessor State into an organ of the successor State were still relevant insofar as they made it possible to ascertain how obligations should be apportioned amongst successor States. As he had stated earlier, inspiration could be drawn from the Institute of International Law resolution in respect of the circumstances to be considered when determining the equitable apportionment of obligations. Furthermore, in draft article 11 (2), for the sake of accuracy, the phrase "in order to settle the consequences of the internationally wrongful act of the predecessor State" should be replaced with "in order to

apportion the obligations arising from the internationally wrongful act of the predecessor State".

In conclusion, he was in favour of sending all the draft articles to the Drafting Committee.

Mr. Murphy said that the report was very interesting and well researched, and covered in some depth the Commission's work on prior succession projects, State practice in relation to succession and State responsibility, and the limited jurisprudence in the area. He found it especially helpful that the analysis was closely tied to the proposed draft articles, as it showed how the related commentary might unfold.

While in the first report the Special Rapporteur had contemplated a general rule of succession of State responsibility with exceptions, in the second report he was now firmly in the camp of those who saw a rule of non-succession of State responsibility when the predecessor State continued to exist, but with exceptions or special rules in some instances. That position was consistent with the views expressed by a "number of delegations" in the Sixth Committee that "considered that the principle of non-succession regarding State responsibility reflected the current law on the matter"; those States included Austria, Iran, Japan, the Russia and Viet Nam. Several other States, including Belarus, Croatia, the Czech Republic and Slovenia, had been "inclined to support the preliminary conclusion of the Special Rapporteur that the 'traditional' theory of non-succession had recently been challenged". He considered the Special Rapporteur's current position to be correct, based on the State practice reviewed in the report.

Turning to the proposed draft articles, he said that draft article 5 basically stated that the rules set forth in the draft articles applied only when a succession of States occurred in accordance with international law. As indicated in the report, that draft article mirrored the approach taken in the Vienna Convention on Succession of States in Respect of Treaties, the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts and the Commission's articles on nationality of natural persons in relation to the succession of States. Like Mr. Park and Sir Michael Wood, he supported proposed draft article 5 and assumed that, if adopted, it would in due course become draft article 3, placed after draft article 1 on scope and draft article 2 on the use of terms.

Draft article 6 purported to set forth a general rule but it was not entirely clear exactly what the "general rule" was. Paragraph 1 asserted one type of rule, while paragraph 2 asserted a different rule. Paragraph 3 then began by referring to "this rule", which appeared to be a reference to the rule set forth in paragraph 2, but it was not absolutely clear if that was indeed the case. In any event, his sense was that only paragraph 1 actually reflected a rule relevant to all cases of State succession, as paragraphs 2 to 4 related solely to situations of succession where a predecessor State continued to exist, not to all cases of State succession. If draft article 6 as a whole was intended to be a "general rule" or, more accurately, "general rules", then it should presumably be supplemented so as to address directly the question of what rule applied when a predecessor State did not continue to exist. Under the current proposals, it appeared that the general rule being advocated was that, where the predecessor State did not continue to exist, obligations arising from an internationally wrongful act of any predecessor State passed to the successor State, subject to certain conditions, which were later identified in draft articles 10 and 11. If draft article 6 were to remain as a "general rules" article, then perhaps a paragraph along those lines should be added to it.

However, given that it might be difficult to identify a general rule or rules that applied to all types of succession, an alternative approach might be considered. Draft article 6 (1) could be separated as a stand-alone draft article so as to apply to all situations of State succession, regardless of how that succession unfolded or whether the situation at hand concerned the rights or claims of a predecessor State or a successor State. Such a stand-alone draft article might be entitled "Effect of succession of States on attribution of responsibility".

Draft article 6 (2) to (4), and draft articles 7 to 9 could then be grouped together, as relating solely to the situation where a predecessor State continued to exist. Within that grouping draft article 6 (2) to (4) would focus on the consequences for the State

responsibility of the predecessor State, while draft articles 7 to 9 would address the consequences for the State responsibility of the successor State arising from three scenarios, namely separation, newly independent States and cession.

Under that alternative approach, the Special Rapporteur might contemplate proposing titles for different "parts" of the draft articles. Part One could be entitled "General provisions" and include the draft articles on scope and use of terms, draft article 5 and draft article 6 (1) as a stand-alone article. Part Two could be entitled "Cases of succession where a predecessor State continues to exist" and include the remainder of draft article 6 and draft articles 7 to 9. Part Three could be entitled "Cases of succession where no predecessor State continues to exist" and consist of draft articles 10 and 11.

The content of draft articles 7, 8 and 9 essentially indicated that the obligations arising from an internationally wrongful act of the predecessor State did not pass to the successor State under each of the three scenarios, but that for each scenario there were certain exceptions or special rules. He had no particular suggestions in respect of the content of the three draft principles, other than to note the malleability or vagueness of the exceptions that resulted from the opening clause "if particular circumstances so require". Further, there was also some repetition, which could be avoided by combining the three draft articles into a single draft article. However, he recognized the value in locating the three scenarios in separate draft articles, with associated commentary.

That said, improvements could be made in the Drafting Committee. For example, if there were a draft article on "newly independent States", then the term should be defined in draft article 2, as the Special Rapporteur suggested in paragraph 125 of the report. That could be done in a manner consistent with the two Vienna Conventions on succession of States and with any issue concerning international protectorates addressed in the commentary.

Unlike draft articles 6 to 9, draft articles 10 and 11 concerned situations where the predecessor State did not continue to exist, specifically when two States united or a State dissolved. The Special Rapporteur suggested, in paragraph 148 of his report, that in those situations there was a "presumption of succession in respect of obligations arising from State responsibility". Like Mr. Park, he was unsure if State practice was sufficient to justify that position. He shared Sir Michael Wood's view that such presumption seemed grounded more in a policy preference than in settled law.

In any event, again, improvements might be considered in the Drafting Committee. For example, while he understood that paragraph 1 of draft article 10 dealt with one type of unification, such as, perhaps, the formation of the United Arab Republic, and paragraph 2 dealt with a different type of unification, such as perhaps the absorption of the German Democratic Republic into the Federal Republic of Germany, consideration might be given to combining the two paragraphs, so as to read: "When a new successor State is formed through the uniting of States, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State." The two situations for unification could then be addressed in the commentary. One advantage of that approach would be that the Commission could avoid declaring particular incidents as squarely falling within one or the other of the two paragraphs. He had in mind Mr. Nguyen's point about the differing views as to the unification of Viet Nam.

In draft article 11, the drafting could be improved to clarify who was entering into an agreement with whom in paragraph 1, and whether the negotiations in paragraph 2 were with the same or different actors. Depending on what was meant, consideration might be given to adding at the beginning of paragraph 2 the phrase "In the absence of such an agreement,".

He had no objection to the Special Rapporteur's plans for future work as described in paragraphs 191 and 192 of the second report.

In conclusion, he recommended the referral of all of the proposed draft articles to the Drafting Committee.

Mr. Reinisch said that he would like to express his appreciation to the Special Rapporteur for his very detailed second report.

In 2017, the Commission had had the opportunity to discuss the Special Rapporteur's general approach to the topic, encapsulated in the "argument that the responsibility of a State might be engaged by way of succession". That alleged new "trend" had been questioned by some members of the Commission. It seemed that the generally accepted premise in international law that State responsibility was incurred by a State for wrongful acts that could be attributed to that State entailed the logical consequence that only the State committing an internationally wrongful act could become responsible for it, excluding any automatic transfer of responsibility to a successor State.

It was indeed with great satisfaction that he read in the second report that the Special Rapporteur clearly emphasized the basic rule of State responsibility expressed in article 1 of the articles on responsibility of States for internationally wrongful acts, namely that "every internationally wrongful act of a State entails the international responsibility of that State". Thus, the Special Rapporteur concluded correctly that it was "evident that *both* the act (conduct) that constitutes a breach and the international obligation breached must therefore refer to *that* State only, and not to any other State, including predecessor or successor States".

Against that background, he welcomed the Special Rapporteur's announcement in paragraph 16 of his second report that he was not suggesting "replacing one highly general theory of non-succession by another similar theory in favour of succession" and that instead "a more flexible and realistic approach is needed".

However, he feared that it was just such a replacement that he saw in the remainder of the report and, even worse, in some of the proposed draft articles, in particular, draft articles 10 and 11, which — miraculously — arrived at a general rule in favour of automatic succession. For instance, draft article 10 stated unequivocally that "when two or more States unite and form a new successor State, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State".

Before discussing those draft articles in more detail, he wished to comment on the report and address the proposed draft articles in sequence.

Draft article 5 provided that "the present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations", following the lead taken by the two Vienna Conventions on succession of States. While understandable, such a provision probably raised more questions than it could solve. Did it suggest that in cases of unlawful succession, such as — to follow the example given by the Special Rapporteur in his second report — the unilateral declaration of independence of Southern Rhodesia, the proposed draft articles should not apply, with the implication that the special rules providing for an exceptional succession to responsibility in paragraphs 2 and 4 of draft article 7 did not apply, thereby privileging the unlawful successor State by exempting it from responsibility? Or would those rules rather apply *per analogiam* anyway? If the latter were the case, one might wonder whether it made sense to restrict the application of the draft articles to lawful successions only.

With regard to draft article 6, he had already expressed his agreement with the general principle contained in paragraph 1, namely that "succession of States has no impact on the attribution of the internationally wrongful act committed before the date of succession of States". Indeed, that wording appeared to be an expression of a general principle of law that responsibility for wrongful acts was based on the attribution of such acts to a subject of law. That was true for tort law as well as criminal law; it went back to the Roman *lex Aquilia* and could be found in all modern systems of law — it was the actor who committed a wrongful or even criminal act who would be made accountable. At the same time, it was also clear that such accountability or responsibility would not accrue to the legal successors of the wrongdoer.

Those thoughts were adequately reflected in the two following paragraphs of draft article 6. Paragraph 2 clarified that a change in territory as a result of a partial succession, for example through secession or incorporation, did not affect the existence of a State or the continuing responsibility of the State for its wrongful acts. Paragraph 3 of draft article 6 was also based on firm ground insofar as it stated that a successor State that continued a

wrongful act started by its predecessor might incur its "own" responsibility if that continuation offered a basis of attribution.

Where the problem really began was with the innocuous statement contained in paragraph 4 of draft article 6, which affirmed that "notwithstanding the provisions of paragraphs 1 and 2, the injured State or subject may claim reparation for the damage caused by an internationally wrongful act of the predecessor State also or solely from the successor State or States, as provided in the following draft articles". While carefully formulated in terms of a right to "claim reparation for the damage caused by an internationally wrongful act of the predecessor State" instead of attribution of wrongfulness, it still signalled that the general principle that responsibility for a wrongful act might accrue only to the subject committing such an act was being discarded and that the consequences of a wrongful act, in particular the obligation to make reparation, could be transferred. Thus, the paradigm shift that the Special Rapporteur had disavowed in paragraph 16 of his report, where he said that he did "not suggest replacing one highly general theory of non-succession by another similar theory in favour of succession", was in fact announced.

He was using the word "announced" because the following draft articles continued on rather safe ground. Draft articles 7, 8 and 9 addressed situations where the predecessor State continued to exist and where thus the general principle of responsibility accruing to the State which had committed an unlawful act would apply.

Draft article 7, dealing with separation of parts of a State, restated in its first paragraph the generally accepted rule that "the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State". What the Special Rapporteur characterized as "exceptions" seemed in paragraphs 2 and 3 to be modelled along the lines of the traditional rules of State responsibility, according to which the acts of a successful insurrectional movement might be attributed to the newly formed State even if those acts had been committed before its formal existence. The latter rule was contained in paragraph 4 of draft article 7.

He found also that the Special Rapporteur had a point in arguing that a similar rule should also apply to acts committed by an autonomous entity of a predecessor State. He thus had some sympathy for the idea of stipulating, as the Special Rapporteur did in paragraph 2 of draft article 7, that "if particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State when the act was carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor State". He was concerned, however, that the limited practice might cast doubt on whether the formulation "the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State" was justified in that case.

He had even more difficulty with paragraph 3 of draft article 7, which provided that the obligations arising from an internationally wrongful act of the predecessor State might be assumed where there was a direct link between the act or its consequences and the territory of the successor State or States. That was a highly indeterminate provision which posed more problems than it solved. Did it purport not to contain a rule of transfer of obligations as contained in paragraph 2, by merely stating that obligations "are assumed" instead of indicating they "will transfer"? What were "direct links" between a wrongful act or its consequences and the territory of the successor State or States? Was that a reference to the unjust enrichment concept sometimes advanced in favour of establishing a rule of succession to State responsibility? The text of that paragraph was highly ambiguous, enigmatic and thus rather impractical.

The report was not very helpful in clarifying the matter. It discussed, in paragraphs 98 to 103, the "link between internationally wrongful act and territory". But it again rather cryptically stated that the "question is neither of the size of a separated territory, nor the fact that the act was perpetrated on the territory of a new State, but more a question of the linkage between the internationally wrongful acts and the territory in question". While acknowledging that there was not really any relevant State practice in that regard, the report considered as "one relevant example of practice" the secession of Belgium from the Kingdom of the Netherlands in 1830, when France, Great Britain, Prussia and the United

States had made a joint application to Belgium —the successor State — requesting compensation from it "solely upon the ground that the obligation to indemnify for such losses rested upon the country within which the injury was inflicted". The puzzled reader was left to ponder what to make of the criterion of "a direct link between the act or its consequences and the territory of the successor State or States" when he or she had been told that the fact of the acts' commission on the territory of what became a successor State was not relevant, while the single relevant practice cited seemed to point exactly to that fact.

It was therefore even more surprising that, while discussing the potential relevance of the principle of unjust enrichment in paragraphs 104 to 106 of his report, the Special Rapporteur did not recur to it as providing the "missing link" between an act and the territory of a successor. While it was certainly correct that unjust enrichment considerations were relevant mostly in the context of succession to State debts, it appeared that they could equally be relevant in order to ascertain a potential link between an unlawful act and the territory of a successor State.

On that basis, he would like to suggest the deletion of paragraph 3 of draft article 7 because of its imprecise and rather unworkable nature.

With respect to the issue of "newly independent States" addressed in draft article 8, the Special Rapporteur noted in paragraph 124 of his report that there was indeed a "question whether the approach, which was justified for codification influenced by the context of decolonization, is still relevant to the present context". In fact, the Commission had already posed that question almost thirty years earlier. In addition, a Tanzanian participant in the United Nations Conference on Succession of States in Respect of Treaties held in Vienna in 1978 had questioned whether the Convention had not "come too late to regulate what is already a *fait accompli* [...] when most of the decolonizing process is over."

He expressed doubt as to whether it was a good idea to retain the category of newly independent States in the present topic, not least considering the fact that the more recent work of the Commission on the nationality of natural persons in relation to succession had already abandoned the category. He noted that the resolution of the Institute of International Law, from which the Special Rapporteur had taken much inspiration, retained the concept of "newly independent States", but he also noted that that had been criticized within the Institute.

As was well known, the special regime foreseen in the two Vienna Conventions on succession of States was often regarded as having contributed to its lack of success in terms of ratifications and accessions. It had sharply divided the Commission and States.

The content of draft article 8 largely mirrored what was provided for "non-newly independent" successor States. Paragraph 1 reiterated the general rule of non-succession. The first sentence of paragraph 2 illustrated what was evidently considered "the principle that a successor State is always free to agree to accept the obligations arising from internationally wrongful acts committed by the predecessor State". Although it was not entirely clear how the second sentence of paragraph 2, particularly the phrase "may be taken into consideration", modified the meaning of the first sentence, presumably that paragraph too, in its essence, stated that consent might override the general rule of non-succession in terms of responsibility. Paragraph 3 of draft article 8 reflected the content of paragraph 4 of draft article 7, itself modelled after article 10 (2) of the articles on responsibility of States for internationally wrongful acts, which, however, referred to the wider category of "a movement, insurrectional or other". In his view, there was no need to limit the reiteration of that principle to the context of a "national liberation movement". Overall, it was thus unclear whether the content of draft article 8 substantively differed from the remaining provisions of the draft articles under consideration.

As a result, he proposed that draft article 8 and thus reference to "newly independent States" should be omitted for four reasons. First, because the distinction related to a phenomenon of the past; second, because it had contributed to the limited acceptance of the previous work of the Commission; third, because it had been a source of disagreement among States; and fourth, because the draft articles under consideration did not contain significant substantive distinctions on that basis in any event.

Since draft article 9, dealing with transfers of part of a territory in cases of cession, largely followed the provisions of draft article 7, his earlier comments on that article applied also largely *mutatis mutandis*.

Turning to the most problematic part of the report and the ensuing proposed draft articles, he noted that in draft articles 10 and 11 the Special Rapporteur purported to have identified rules of succession to obligations resulting from State responsibility where the predecessor State or States ceased to exist.

Different from the cases of secession or cession, draft articles 10 and 11 stipulated that in cases of unification, dissolution or incorporation the obligations stemming from the wrongful acts of predecessor States generally passed to their successor States. In fact, the formulation of the respective draft articles, such as draft article 10 (1) and draft article 11 (1), went far beyond what the report more modestly proposed in paragraph 148, where the Special Rapporteur said that "the general rule of non-succession should be replaced rather by a presumption of succession in respect of obligations arising from State responsibility".

Draft article 10 (1) unequivocally stated that "when two or more States unite and form a new successor State, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State". Draft article 11 (1) stated that "when a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the obligations arising from the commission of an internationally wrongful act of the predecessor State pass, subject to an agreement, to one, several or all the successor States". He noted that the latter formulation could be read to mean that a succession occurred only subject to an agreement by the successor State or States; however, he was concerned about the Special Rapporteur's comment in paragraph 189 of the report, where he said that "a transfer of obligations may take place according to or in the absence of an agreement. At the very least, the successor States have to negotiate among themselves and with the injured State in good faith". That could mean that only the precise allocation or share of responsibility was subject to an agreement, whereas in principle obligations passed automatically just as they did in the other case where no predecessor State survived, *i.e.* the case of a merger of States as contained in draft article 10. While the second report repeatedly asserted that that would reflect a modern trend, it was more than reluctant to provide actual instances of State practice that would support the claim that successor States actually succeeded to the consequences of responsibility.

What was particularly telling was that practically all the examples mentioned by the Special Rapporteur in paragraphs 153 to 155, 169 and 170 of the second report to support the alleged rule of succession to State responsibility were taken from the field of expropriation. While uncompensated expropriation might indeed constitute a wrongful act, it was also clear that the act of expropriation as such was not illegal in international law. That was a firmly established rule in customary international law and was abundantly repeated in various international investment agreements that did not prohibit expropriation, but rather made the lawfulness of expropriations dependent, among others, upon the payment of some form of compensation.

Thus, the payment of such compensation could be seen as the discharge of a debt. Therefore, the practice referred to in the second report whereby successor States had agreed to pay compensation for property taken by their predecessors could also be regarded as indicating that States lived up to their obligations to pay the debts incurred by the predecessor States that had expropriated foreign assets, which, as such, was not unlawful.

That practice also served as a strong reminder of the unjust enrichment paradigm underlying the obligation to pay compensation in case of expropriation. While States were free to exercise their right of "eminent domain", or however the right to expropriate even foreign assets might be termed, they could do so lawfully only under the condition that they made "adequate" or "appropriate" compensation. That condition safeguarded against an unjust enrichment of the expropriating State. Thus, the examples mentioned in the second report might be useful for the unjust enrichment rationale sometimes discussed in the context of potential demands of succession in respect of obligations deriving from State responsibility. However, they could hardly be used as forms of State practice confirming a

rule of succession to the obligation to make reparation for wrongful acts of a predecessor State.

The true rationale for the purported rules of succession contained in draft articles 10 and 11 could rather be found in paragraphs 147 and 167 of the report. In paragraph 147, the Special Rapporteur argued that the application of the general rule of non-succession to cases in which the predecessor State ceased to exist would mean that no State incurred obligations arising from internationally wrongful acts, and that such a solution would hardly be compatible with the objectives of international law, which included equitable and reasonable settlement of disputes. Such a justification constituted a *non sequitur*. The principle of peaceful — as well as equitable and reasonable — settlement of disputes was intended to dissuade States from taking the law into their own hands and, as provided for in Article 33 of the Charter of the United Nations, required that disputes should be settled by pacific means. However, an obligation to settle disputes did not guarantee any particular outcome. Whether a State was responsible for wrongful acts depended on the applicable rules of State responsibility and the primary rules of international law that might have been violated. It could even stem from a rule of State succession, if such a rule could be established, but it was not possible to infer such a rule from a duty to settle disputes.

In paragraph 167 of the report, rather than grounding the principle of succession to obligations arising from internationally wrongful acts in State practice or *opinio juris*, the Special Rapporteur based his interpretation on one voice of legal scholarship which deplored the idea that in a situation where a responsible actor disappeared no one could be made responsible. While the desire that someone should always be held responsible for a wrongful act was understandable, such a wish did not make a rule of law, either *lex lata* or *de lege ferenda*, just and equitable. And although the Special Rapporteur's interpretation might reflect the view of claimants, it might not reflect that of successor States, who might claim that they should not be held accountable for the wrongdoings of their predecessor States. Such an interpretation was indeed highly questionable from a doctrinal point of view, since it implied a State's responsibility for unlawful acts committed by another subject of law without any unlawfulness attributable to the successor State.

The purported rules proposed in draft articles 10 and 11 were all the more unjust and inequitable as they depended on the purely fortuitous circumstance of whether the predecessor State remained in existence. He failed to understand why a successor State in case of a separation should not incur any obligations resulting from the unlawful acts of a predecessor State that continued to exist — as was suggested in draft article 7 (1) — whereas a successor State in the event of a dissolution would incur such obligations, according to draft article 11 (1). The only rationale offered in the report was that there must always be someone to blame, but that might not really reflect justice and equity.

He supported the Special Rapporteur's position that one highly general theory of non-succession should not be replaced with another similar theory in favour of succession. However, since draft articles 10 and 11, among others, were not consistent with that position, he proposed that they should not be referred to the Drafting Committee at the current stage. Instead, the Special Rapporteur should conduct further research in order to ascertain whether sufficient practice or cogent arguments *de lege ferenda* could be identified in support of those draft articles.

To conclude, he supported the referral of draft articles 5, 6, 7, and 9 to the Drafting Committee.

Ms. Galvão Teles, after thanking the Special Rapporteur for his well-researched second report, said that she would begin by commenting on the title of the topic and then address some general issues arising from the report regarding draft articles 6 and 5. She would not at the current stage comment on the remaining draft articles related to the rules applicable to the different types of succession and reserved the possibility to make specific comments on all the seven draft articles proposed during the work of the Drafting Committee.

The title of the topic had a bearing on the content of the Commission's work, particularly on the question of the necessity or otherwise of determining a general rule of succession or non-succession in respect of State responsibility. Referring to the debate of

the Sixth Committee at the General Assembly's seventy-second session in 2017, she noted that the delegation of Austria had suggested that "State responsibility problems in cases of succession of States" would be a more apt title for the topic. Such a title would lead to a different — but perhaps more appropriate — approach, as it would shift the focus of the Commission's work onto the effects of instances of State succession with regard to State responsibility, rather than the determination of whether or not there was succession regarding responsibility, as suggested by the current title. It should be noted that the outcome resolution adopted by the Institute of International Law in 2015, much of which recalled the Commission's work on the topic thus far, was titled "Succession of States in matters of International Responsibility", and focused on the effects of State succession in respect of the rights and obligations arising out of internationally wrongful acts. As she had stated at the previous session, that area should also be the focus of the Commission's work, rather than that of State responsibility *per se*. That said, it was perhaps a matter that could be revisited at a later stage, in the light of the evolution of the work carried out.

Turning to general issues arising from the report, she said that she would like to address, first, the question of the establishment of a general rule as proposed in chapter III of the report, and in draft article 6, as compared to other approaches; and, second, the question of the legality of succession, the subject of chapter II and of draft article 5.

While appreciating the reasons behind the Special Rapporteur's proposal in paragraph 14 of the second report that an in-depth discussion of draft articles 3 and 4, as proposed in his first report, should be postponed, she said that the crucial issues raised in those draft articles warranted further consideration, since practice showed that they were often the object of settlements or of agreements and unilateral declarations.

Referring to the Special Rapporteur's appeal, in paragraph 16 of the report under consideration, for a flexible and realistic approach, the outcome of which might be, as he put it, "a confirmation of non-succession in certain legal relations arising from State responsibility and a formulation of special rules (or possible exceptions) on succession in others", she said that she continued to be of the view that the rules to be identified or established within the draft articles were merely of a subsidiary nature, as States would continue to prefer resolving such matters through unilateral undertakings or bilateral or multilateral agreement. Bearing that in mind, it might be useful to consider whether to include a provision in the draft articles concerning their subsidiary nature, similar to what was proposed in article 3 of the 2015 outcome resolution of the Institute of International Law. In that connection, she was still not convinced of the need for draft article 6, entitled "General rule", and would instead favour an approach consisting of the establishment of certain common rules and then the setting out of specific categories of State succession, similar to that adopted in the Institute's resolution.

As she had stated at the previous session, she agreed that the Commission's work on the topic should encompass all types of succession, although the comments by Mr. Reinisch with regard to newly independent States warranted further consideration. It was clear that different types of succession might require different solutions, in particular regarding whether or not there was a continuing State; that approach seemed to be supported by the Special Rapporteur.

The Special Rapporteur's second report hinged on whether or not a predecessor State continued to exist. That aspect, while of fundamental importance, was difficult to pinpoint in reality. The issue of the plurality of responsible States and shared responsibility was to be discussed only in the fourth report. In the meantime, it would be useful to have some clarity on such types of succession; otherwise, there was a risk that the conclusion as to the existence of a single general rule might be premature.

With regard to the legality of succession, she agreed with the analysis presented in chapter II of the report and the related draft article 5, although she noted Mr. Reinisch's comment that further consideration of the matter was necessary. The Commission's work on the topic of State succession was unique in that it relied on two different areas of international law and strove to provide guidance on the specific problem posed by the interaction between those two fields. That being said, the Commission could not avoid dealing with some general aspects of the system of international law. As the Special

Rapporteur pointed out in his report, there were two completely separate issues: the unlawfulness of territorial changes and the succession itself. However, identifying and dealing with those issues was not simple in practice.

The absence of an automatic compulsory superior authority to decide on the issue of whether a given situation was legal or illegal was also a problem. That in turn risked creating difficulties in the practical implementation of the draft articles and, in her view, militated in favour of an approach based on settling such matters by agreement between the parties concerned and on the subsidiary character of the solutions proposed.

To conclude, she supported the referral of all the proposed draft articles to the Drafting Committee, bearing in mind the comments made in the plenary meetings on the topic and the possibility of making specific drafting comments on draft articles as a whole in the Drafting Committee.

Mr. Rajput, commending the Special Rapporteur for his flexibility in being willing to keep draft articles 3 and 4 in abeyance until other segments of the topic had been completed, said that he was confident that the Special Rapporteur would not allow academic or theoretical convictions to prevent the Commission from reaching a reasonable outcome to its work on the topic.

Regarding methodology, it would have been helpful if the relevant provisions of the treaties referred to in the report had been set out in full either in the text or in footnotes. Furthermore, as in his first report, the Special Rapporteur referred to academic writings about certain cases rather than giving direct references to the cases in question; doing so gave the impression that the Special Rapporteur had not reviewed the cases himself but was relying upon the analysis of another scholar. It was not only convenient but also fair for Commission members to have the opportunity to examine the original sources in addition to the Special Rapporteur's own analysis of the cases.

Turning to the draft articles themselves, he said that he supported draft article 5, which appeared non-controversial. While it did raise questions as to the distinction between legal and illegal succession, he recalled that the Commission had already had a debate on such issues, when discussing what had become article 6 of the 1978 Vienna Convention on Succession of States in respect of Treaties; he did not believe that reopening such a debate would prove fruitful.

There were several conceptual problems with chapter III of the report and consequently with draft article 6. The title of section A within that chapter, "No impact of State succession on attribution", gave the impression that attribution of responsibility to a successor State was unaffected by the fact of succession. Moreover, that very notion could be perceived as a subtle reintroduction of the so-called change to the non-succession rule.

Referring to the second sentence in paragraph 42, which quoted from the commentary to the Commission's draft articles on succession of States in respect of State property, archives and debts, he said that it was unclear why just one sentence had been selected from the Commission's work on one topic relating to State succession and not another. Moreover, it was difficult to accept that one sentence, in relation to succession of debts — which was a specific instance of succession — could constitute the basis for a general rule that attribution of State succession was unaffected by succession. A similar point had been made by Sir Michael Wood.

In paragraphs 44 to 46 of his report, the Special Rapporteur declared that the Commission's articles on responsibility of States for internationally wrongful acts did not adhere to the rule of non-succession and that the Commission's work was based on the fact that the traditional doctrine of non-succession in respect of responsibility had come mostly from the period prior to the codification by the Commission of State responsibility, thereby indirectly suggesting that the traditional doctrine of State succession had changed since the Commission had completed its work on the articles on State responsibility. Paragraph 47 of the report went on to claim that the change had been effected by virtue of a few references, primarily those of two authors, one of which predated the Commission's work on State responsibility. The support for such a statement therefore seemed lacking.

Section A of chapter II ended on a radical note, shaking the most basic ideas of jurisprudence, particularly those on the relationship between rights and obligations. The suggestion that, with regard to internationally wrongful acts committed prior to succession, responsibility was attributable to the predecessor State, but that the successor State would still be responsible for reparation, to the extent that it could afford it, turned not only the rationale behind State responsibility, but the very idea of rights and remedies, on its head. Although no source was provided for the conclusions contained in paragraph 50, the latter's content reflected that of article 4 (2) and (3) of the 2015 outcome resolution of the Institute of International Law. In fact, the report, in paragraph 47, stated that the general rule was supported by paragraphs 1 and 2 of article 4 of the same resolution, but failed to mention paragraph 3, which radically stated that a successor State would bear some responsibility, at least to the extent of paying reparations, within its means. Paragraph 25 of the provisional report of the Special Rapporteur of the Institute of International Law on the succession of States in matters of international responsibility provided some arguments as to why that should be so. In that report, the Special Rapporteur had relied on article 11 of the 1978 Vienna Convention on Succession of States in respect of Treaties, which stated that State succession did not affect "a boundary established by a treaty" or "obligations and rights established by a treaty and relating to the regime of a boundary". It was important to note that boundary treaties had been dealt with separately owing to their importance in international relations. The doctrine of *rebus sic stantibus* did not apply to boundary treaties under article 62 (2) of the 1969 Vienna Convention on the Law of Treaties. It was weak logic to argue that since boundary treaties were succeeded to by States, there was a duty to pay reparation even if the responsibility was not part of the succession *per se*. That very discussion appeared in draft article 6 (4) as a without-prejudice clause, about which he had serious reservations. While the consideration of the so-called change to the non-succession rule was still pending, he wondered if it was appropriate for the Commission to consider draft article 6 (4), which was also trying to introduce the same notion. He therefore did not support the referral of draft article 6 (4) to the Drafting Committee.

The idea of a successor State being responsible for reparations appeared to be the focus of the report. The Special Rapporteur, in developing that logic, argued that all that needed to be established was the attribution of responsibility. In paragraph 48 of the report, he declared that there were two exceptions to the rule of non-succession: continuing breaches, as provided for under article 14 (2) of the articles on responsibility of States for internationally wrongful acts; and composite acts, as provided for under article 15 of that text.

The doctrine of continuous and composite acts was well settled in jurisprudence and uncontroversial, but the question was whether it was relevant in the context of succession, as suggested in the report. It was important to draw a distinction between succession of government and succession of State. The former had no effect on the legal personality of a State, so a government's acts were binding on its successor. The latter, meanwhile, did change the legal personality of a State, as a successor State was a new State. In the case of a continuing breach, a successor State was independently responsible for the breach from the time when the State came into existence. The continuous character of a breach could not have any impact on attribution, because the new State had not existed when the breach had commenced. The concepts of "continuing breach" and "composite act" were of little relevance in situations of State succession. Article 14 (2) of the articles on responsibility of States for internationally wrongful acts contained a reference to "an act of a State having a continuing character", while article 15 included the words "breach of an international obligation by a State through a series of actions or omissions". In both situations, the act or acts had to be committed by the same State, not another State with a distinct legal personality. He hoped that, as noted by Mr. Reinisch, the Commission's quest to put the blame on someone did not lead it to go against what had been established in the articles on responsibility of States for internationally wrongful acts. If one studied an example given in the articles to explain a composite or continuous act, the situation became quite clear: the responsibility of a successor State for the unlawful occupation of an embassy arose only after the date of succession.

While he had no serious reservations about proposed draft article 6 (1) to (3), he was concerned that the relevant discussion in the report might find its way into the commentaries and expand the scope of the provisions, which was to be resisted.

Although proposed draft articles 7 to 10 dealt with different types of succession, four common themes were evident: reliance on treaties, activities of organs, territorial nexus and insurrectional movements. The four themes were present in the provisions to varying degrees. He agreed with the Special Rapporteur on the theme of insurrectional movements, but not the other three. The first theme, which was essentially methodological in nature, was reliance on treaties, which formed the basis of the texts of specific instances of succession. In all the treaties mentioned in the report, the successor State had agreed to undertake responsibility only in relation to the State with which it had entered into a treaty, and the responsibility had been undertaken only in relation to a certain subject matter covered by that treaty. The successor State had not undertaken responsibility across the board or towards other States. The example from Viet Nam provided by Mr. Nguyen in his statement had been particularly helpful in that regard.

The second general theme was the responsibility of a successor State for the actions of an organ of its predecessor State. The theme was presented in proposed draft articles 7 (2) and 9 (2). The title of the relevant discussion in the report included the term "autonomous entity", which was not defined anywhere or used in the text of the proposed draft articles, where one instead found references to "an organ of a territorial unit". He assumed that the Special Rapporteur was employing the two descriptors synonymously, yet they probably had different meanings. The term "autonomous entity" evoked some sort of independent body such as the judiciary, whereas a "territorial unit" appeared to be something connected with regional or local administration. It was not clear exactly what type of body was envisaged in the proposed draft articles.

The only material presented in the report in support of that territorial nexus — according to which, if the breach of an international obligation related to a certain territory, a successor State in that territory succeeded to the obligation — was a brief description in paragraph 97, which included a citation to paragraph 65 of the *travaux préparatoires* of the Institute of International Law from 2015. Apart from that, he could not find anything in the report to substantiate the theory of a territorial nexus or the idea that an autonomous unit that had committed a wrongdoing prior to succession would continue to bear responsibility after succession, which almost gave the impression that an organ of a State continued to exist after succession, whereas a new State was endowed with a new legal personality.

Regarding the notion of a territorial nexus, how did one identify which violations of international law or breaches of international obligations were linked to a given territory? Expropriation, for instance, always related to property. Did that mean that all expropriations had a territorial nexus and that responsibility for them was passed on?

Ultimately, he was not comfortable with referring to the Drafting Committee any of the proposed draft articles that were grounded in the notion of a territorial nexus, namely draft articles 7 (3), 8 (2) and 9 (3). On the theme of insurrectional movements, he agreed fully with the Special Rapporteur and had no reservations.

As to proposed draft article 11, on dissolution of States, he agreed with paragraph 1, but had some reservations regarding paragraph 2, which imposed an obligation to negotiate in good faith. He did not think that the Commission should introduce the doctrine of the duty to cooperate, which had a certain normative value.

The Commission had to seek a balanced form of justice. In protecting the interests of a wronged State, the wrong party should not be held accountable. The work of the Institute of International Law was of great importance to the topic and should be used as a source of inspiration. The Commission should be aware, however, that the Institute operated in a different setting. It was good that the Institute's work should serve as a point of departure for the topic, but it ought not to be the final destination.

To conclude, he did not support the referral of proposed draft articles 6 (4), 7 (2) and (3), 8 (2) or 9 (2) and (3) to the Drafting Committee. He struggled to see how sufficient material could be found to support the provisions in question in the commentaries. He was

comfortable with the remainder of the provisions being sent to the Drafting Committee. Despite his reservations, he looked forward to seeing what shape the topic took in the future.

Mr. Aurescu said that he wished to praise the Special Rapporteur for his excellent report, his very complete and enlightening oral presentation of it and his outreach efforts aimed at highlighting the importance of the topic in various academic environments.

As noted by the Special Rapporteur, the purpose of the report was to "address, in addition to certain general rules, mainly the issues of transfer of the obligations arising from the internationally wrongful act of the predecessor State". He welcomed the fact that the report proposed a new approach to the topic in the light of the debate that had taken place during the sixty-ninth session of the Commission, with the Special Rapporteur having understood the importance of examining general substantive rules relating to succession of States in respect of State responsibility before turning to potential exceptions or saving clauses. He also welcomed the methodology embraced in paragraph 16 of the report, in which the Special Rapporteur admitted that State practice was diverse, context-specific and sensitive in the area of succession or non-succession in respect of State responsibility. Consequently, the Special Rapporteur did not suggest replacing the general theory of non-succession with another similar theory that favoured succession, and agreed that a more flexible and realistic approach was needed.

Bearing in mind the theory of non-succession, he found the reference, in paragraph 148 of the report, to a so-called "presumption of succession" in respect of obligations arising from State responsibility somewhat questionable. For the same reason, he had reservations about the call, in paragraph 167, for a "rejection of a strict and automatic application of the principle of non-succession". A similar line of reasoning was followed in paragraphs 185 and 187.

While he agreed with the approach mentioned in paragraph 17 of the report, he did not fully understand the relevance of the assertion, in paragraph 19, that the concept of State responsibility under contemporary international law was "a bundle of principles and rules of a secondary character". Nevertheless, he agreed with the Special Rapporteur's argument in paragraph 20 that, in determining general rules of succession or non-succession, various factors had to be taken into account, such as whether a breach was completed or continuing, localized damage and especially the continuing existence or disappearance of a predecessor State.

Concerning paragraph 21, it was not clear why the Special Rapporteur chose to deal with the issue of the transfer or non-transfer of obligations arising from an internationally wrongful act committed by a predecessor State before the issue of the transfer of rights and claims, which the Special Rapporteur planned to examine in his third report.

In paragraph 35, the Special Rapporteur mentioned the case law of the European Court of Human Rights regarding Cyprus. It would also be useful to examine cases regarding Transnistria, such as *Ilaşcu and Others v. Moldova and Russia*, *Ivanţoc and Others v. Moldova and Russia*, and *Catan and Others v. Moldova and Russia*, which might be of relevance to the practice of not accepting statehood.

In paragraph 37, the Special Rapporteur stated that, "apart from cases of consensual, agreed succession or devolution and the cases of the above-mentioned illegality, there are quite a few situations of unilateral declaration of a new State as a result of insurrection or revolution. Those are social facts not considered to be in violation of international law". The Special Rapporteur seemed to infer that, between the cases where succession or devolution were illegal and those where they were legal, there was a grey area in which cases could not be classified because they were "social facts" and so could not be "considered to be in violation of international law". The Special Rapporteur cited paragraph 81 of the International Court of Justice's advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*. However, in that paragraph, the Court confirmed that "no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council". In reality, in its advisory opinion, the Court had not examined the legality of the statehood of Kosovo. Rather, it had considered whether or not the act of declaring

independence had been in conformity with international law. In paragraph 51 of the advisory opinion, it was asserted that:

> "In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State."

In conclusion, there was no such thing as a social fact that excused or excluded the application of international law: a succession was either in conformity with, or in breach of, international law. *Tertium non datur*.

In paragraph 38, the Special Rapporteur followed the same kind of approach, mentioning secession for the first time in the report. Although secession was a typical category of succession, the word "even" at the beginning of the paragraph was insufficient to explain why secession had been included for demonstrative purposes. That the reference to secession was misplaced was further substantiated by the fact that paragraphs 37 and 39 referred not to secession, but to succession, and the fact that secession was addressed *expressis verbis* in paragraphs 78 *et seq*.

The ideas that underpinned paragraph 46 seemed, at times, to be contradictory. It was mentioned, first of all, that a wrongful act should not be attributed to any State other than the one responsible for it. The conclusion of that line of argument was that the predecessor State and the successor State were excluded from the application of responsibility. In the same paragraph, however, it was mentioned that the continuing State, *i.e.* the predecessor, should remain responsible for its own internationally wrongful acts. It appeared, therefore, that the paragraph established both a rule and an exception.

In paragraph 47, reference was made to "more recent" writings, namely scholarly works from 2007, which were indeed recent, and ones from 1990 and 1992, which, in his opinion, could no longer be described as recent.

The discussion of reparation and State responsibility in paragraphs 49 and 50 was not particularly clear. It was difficult to establish the meaning of the paragraphs in the context of remedies other than reparation that States could request, and which remedies were included in the notion of reparation. Paragraph 54 complicated matters further by implying that cessation was not necessarily a form of reparation.

The link between responsibility and damage, or reparation, was dealt with in a number of paragraphs in the report. In paragraph 83, for example, it was stated that Czechoslovakia, Poland and Yugoslavia "should not bear responsibility for such damage". While the quoted language was not necessarily that of the Special Rapporteur, the provisions of article 1 of the articles on responsibility of States for internationally wrongful acts should be observed. Indeed, the idea that responsibility arose when wrongful acts occurred, and not when damage occurred, was one of the pillars of State responsibility. He would have preferred to see a more thorough explanation in the report of the interlinkages between "responsibility", "reparation" and "damage", with the end goal being the observance of article 1 of the articles on responsibility of States for internationally wrongful acts.

The phrase "*tabula rasa*", which was first used in paragraph 124 of the report, should have been explained in greater detail, as its meaning in the context of State succession was not necessarily the same as its regular meaning. Lastly, the Special Rapporteur should have elaborated on the notion of a "territorial limitation" clause, which was mentioned in paragraph 170 of the report.

Turning to the proposed draft articles, he said that he had no substantial comments to make about the drafting of proposed draft article 5. He would, however, prefer to speak of "succession", rather than "a succession", in order to keep the wording more general.

It was his understanding that the purpose of proposed draft article 6 was to set the scene for the provisions that followed, taking into account its general nature and its title, "General rule". In his view, the proposed draft article should be made clearer and more streamlined. The first two paragraphs seemed to contradict each other, in that, if the first was valid, the second was invalid. Although the second paragraph was probably meant to establish an exception to the rule set out in the first, the relationship between the two paragraphs should be more obvious from the manner in which they were drafted.

He would also suggest replacing the words "a reparation" with a more general reference to "reparation". The use of an indefinite article could imply that only one form of reparation could be requested when a wrongful act occurred. In reality, however, reparation could be achieved in international law through a multitude of mechanisms, and no exclusions or limitations were applicable, with the exception of the ones provided for in the articles on responsibility of States for internationally wrongful acts, notably article 35.

Furthermore, and perhaps most importantly, it should be recalled that the articles on responsibility of States for internationally wrongful acts provided that the notion of responsibility was not strictly connected with the notion of injury and that the existence of a wrongful act was the main element of responsibility. As a result, State responsibility could be invoked even if no injury existed, or, in other words, no damage had been suffered.

The provisions of paragraph 3 were clear and sufficiently well developed. For the sake of clarity, however, he would replace the word "it" with "the successor State".

Proposed draft article 7 (1) was effective in establishing the general rule applicable to secession of States. In paragraphs 2 and 3, the words "if particular circumstances so require" could be deleted, as their inclusion might raise issues related to the interpretation of "particular circumstances" and to the link between the circumstances and the requirement. In paragraph 4, he would welcome a more detailed explanation of the situations in which the conduct of a movement, insurrectional or other, that succeeded in establishing a new State in part of the territory of a predecessor State or in a territory under its administration, could trigger the responsibility of the new State and be considered an act of the new State. The text as it stood seemed to focus on the conduct, rather than the responsibility.

Proposed draft article 8 (1) was effective in establishing the general rule applicable to newly independent States. The formula "newly independent State" should be either included in the definitions or explained in the commentary to the draft article. In paragraph 2, the word "agrees" should be replaced with "agree". As in proposed draft article 7 (2) and (3), the concept of "particular circumstances" could be removed. If it was retained, however, the preceding definite article should be deleted, given that it was the first reference to "particular circumstances" in the draft article. Deleting the definite article would avoid any controversy over which particular circumstances were being discussed. The word "substantive" could also be deleted in paragraph 2, as the differences between substantive and procedural autonomy could raise difficult questions related to State responsibility.

He had no comments to make regarding proposed draft article 9 (1). In paragraphs 2 and 3, the words "particular circumstances" could again be deleted, for the reason given in relation to proposed draft article 7 (2) and (3). On a more general note, the word "territory" should be clearly defined in the commentary to the draft article. In particular, it should be specified whether the word referred only to State territory or also covered other areas over which the State exercised sovereign rights and jurisdiction, such as exclusive economic zones, contiguous zones and continental shelves. In his view, those areas should also be covered by the rule established in proposed draft article 9.

In proposed draft article 10 (2), the word "arising" should be included, as it was in paragraph 1. Paragraph 3, as currently drafted, could be interpreted as meaning that the consent of a State that claimed a breach of an international obligation, referred to as the "injured State" in proposed draft article 10, was not a condition for a valid agreement related to the responsibility of a new State. The word "including" might prove controversial, since it raised questions over whether a valid agreement would be bipartite or tripartite. Consequently, the provision should be redrafted.

In proposed draft article 11 (1), the phrase "the obligations arising from the commission of an internationally wrongful act of the predecessor State pass, subject to an agreement, to one, several or all the successor States" was rather confusing. It opened such a wide range of possibilities that it became difficult to determine the specific rule to be followed in respect of State responsibility in the event of dissolution.

In paragraph 2, while the inclusion of a reference to good faith negotiations between States was commendable, he did not necessarily agree with the implied inclusion of elements such as "a territorial link" and "an equitable proportion" within the scope of good faith. The manner in which good faith was interpreted should not be limited, even vaguely, by notions of "equity".

In conclusion, he wished to reiterate his appreciation of the Special Rapporteur's work. Taking into account his earlier observations, he was in favour of sending all the proposed draft articles to the Drafting Committee.

The meeting rose at 12.10 p.m. to enable the enlarged Bureau to meet.